PUBLIC BANK BHD

v.

NOOR EHSANNUDDIN MOHD HARUN

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24-771-1998]
29 SEPTEMBER 2000

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether established - National Land Code 1965, s. 256(3)*

LAND LAW: *Charge - Notice of default - National Land Code 1965, s. 254 - Form 16D - Inclusion of unsecured charge - Whether notice flawed*

The defendant requested and the plaintiff agreed to grant a loan and an overdraft to the defendant in consideration of the security of two legal charges over some land. Sometime later the plaintiff granted another overdraft to the defendant, secured by the deposit of shares in public listed companies.

The issue for judicial determination is whether the Form 16D issued by the plaintiff was bad as it required the defendant to remedy not only the breach with respect to the charge but also with respect to the breach of the 2nd overdraft secured by the deposit of shares.

Held:

[1] Only a registered chargee may serve a notice in Form 16D and it must bear only upon the registered charge. It is available only to a chargor qua chargor to give notice to the chargor to remedy the specified breach of the charge in question before action for sale is taken and cannot be taken out for any other purpose. If the breach is not remedied at the expiry of the period specified, then the chargee is sanctioned to apply for an order for sale.

[2] Whether a notice of default with respect to a charge or charges in Form 16D is bad in law depends on whether the chargor has been prejudiced or misled by any defect in the notice so as to render the granting of the order for sale unjust, and this in turn must necessarily depend on the circumstances of each particular case.

[3] There is a distinction between an innocent erroneous sum specified in a demand and a wrongful demand for payment of something to which the chargee is not entitled whether under the charge or under a statutory provision.

[4] This is a case where the plaintiff had no right to use the notice in Form 16D to demand for the additional sum. Foist with the additional burden of the 2nd overdraft that was much heavier than the burden of the fixed loan secured by the 1st charge, it could be hard to believe that the defendant would not have been prejudiced by the defect in the said notice.

[Application dismissed with costs.]

Case(s) referred to:

Arab-Malaysian Merchant Bank Bhd v. City Properties Sdn Bhd [1992] 4 CLJ 2123 ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(refd)***

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144 ***(refd)***

Jacob v. Overseas-Chinese Banking Corporation Ipoh [1974] 2 MLJ 161 ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors [1989] 1 MLJ 457 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8 ***(refd)***

Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn Bhd [1990] 2 CLJ 711 ***(refd)***

Oriental Bank Bhd v. Mohinder Pal Kaur Tirlok Singh [1996] 1 MLJ 788 ***(refd)***

Overseas Union Bank v. L & L Properties Sdn Bhd [1999] 3 CLJ 47 ***(refd)***

Overseas Union Bank Ltd v. Lee Guat Cheow & Co Sdn Bhd [1987] 1 MLJ 51 ***(refd)***

Southern Bank Bhd v. Chuah Beng Hock [1999] 5 CLJ Supp 620 ***(refd)***

Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd [1984] 1 CLJ 78 ***(foll)***

United Malayan Banking Corpn Bhd v. Bahruddin Mohammad [1992] 4 CLJ 2060 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 253(1), 254, 256(2), (3), 340

Other source(s) referred to:

National Land Code, A Commentary, Judith Sihombing, 2nd edn, p 552

For the plaintiff - Ana Shahrana Annuar; M/s C Sukumaran & Co
For the defendant - Cherian Kuruvila; M/s Feroz & Co

Reported by Yow Ting Fong

JUDGMENT

Jeffrey Tan J:

This is the plaintiff/chargee's application (encl. 2 dated 22 December 1998), under s. 256 of the National Land Code 1965 (Code), for an order for the sale of the defendant's land held under H.S.(D) 6577 P.T.D. 4050, Mukim Kluang, Daerah Kluang, Negeri Johore (hereinafter called the said land).

On the matter of an application for an order for sale by the chargee made in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure, and it has to be said that a chargee so applying is only exercising his right as chargee (*Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; *Arab-Malaysian Merchant Bank Bhd. v. City Properties Sdn. Bhd.* [1992] 4 CLJ 2123; *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332), it is settled, that the court shall order the sale of the land or lease to which the charge relates, "unless it is satisfied of the existence of cause to the contrary" (see s. 256(2) and s. 256(3) of the National Land Code 1965). "Section 256(3) of the National Land Code is mandatory. The court shall order a sale unless it is satisfied or the existence of 'cause to the contrary'" (*Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors* [1989] 1 MLJ 457).

The court is required, by the expression "cause to the contrary", to decide whether there are circumstances sufficient to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved (*Keng Soon Finance Bhd v. MK Retnam Holdings Sdn. Bhd. & Ors* [1983] 2 MLJ 384). Even "granted that these words have been construed ... as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they (do not) extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly ... ." (*Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors* [1989] 1 MLJ 457).

The role of the judge, when dealing with applications under s. 256, so as the Federal Court per Gopal Sri Ram explained, in *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36, 51, is as follows:

> A judge hearing an application ... is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the narrow question whether the material produced before him by the chargor constitutes cause to the contrary.
>
> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.
>
> On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction ... .
>
> Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. An application under s. 256 is opposed by the chargor on the ground that the chargee has acted in breach of the contract, eg by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the moneys paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s. 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all the complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s. 256 to properly appreciate their true role assigned to them by Parliament.

At p. 52, the Federal Court further explained:

> ... an order for sale made pursuant to s. 256 of the Code is not a judgment. That was settled by the decision of the Supreme Court in *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn. Bhd* [1988] 1 MLJ 257, where Seah SCJ speaking of an order for sale said (at p. 258):
>
> > Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not a covenant but under the registered charge.

In *Kandiah Peter v. Public Bank Bhd* [1994] 1 MLJ 119, the Supreme Court affirmed this principle and held that the making of an order for sale upon the failure of a chargor did not bar a subsequent action *in personam* brought by the chargor based upon the same facts that did not avail him in opposing the application under s. 256. Eusoff Chin SCJ (as his Lordship the Chief Justice then was) set out the relevant law in the following terms:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment. The court hearing the application for foreclosure does not make, and in any event ought not to make, adjudication upon any substantive issue ... .

"Cause to the contrary" may be established, so as the Federal Court imparted in *Low Lee Lian v. Ban Hin Lee Bank Bhd. (supra)*, only in the following three categories of cases:

(a) where a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the NLC;

(b) where the chargor is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; or,

(c) where the chargor is able to demonstrate that the order for sale would be contrary to some rule of law or equity.

But it is for a chargor to "show cause" either in law or equity against an application for sale (*Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors (supra)*; *Overseas Union Bank Ltd v. Lee Guat Cheow & Co. Sdn. Bhd*. [1987] 1 MLJ 51). The chargor must adduce evidence by affidavit to discharge that onus (*Overseas Union Bank Ltd v. Lee Guat Cheow & Co. Sdn. Bhd*.)

On the facts and issues of the case, the plaintiff asserted, in the supporting affidavit (encl. 4), that the defendant requested and the plaintiff agreed, in consideration, *inter alia*, of the security of two legal charges over the said land, to grant a fixed loan of RM125,000 and an overdraft of RM45,000 to the defendant, and that pursuant to that agreement, the defendant created, on 12 June 1993, two legal charges (Gadaian Perserahan

No 24242/93, Jilid 2784 Folio 02 and Perserahan 17168/95 Jilid 3241 Folio 93) over the said land in favour of the plaintiff. The plaintiff further asserted, that sometime later the defendant requested and the plaintiff granted an overdraft of RM650,000 to the defendant, secured not by any charge but by the deposit of shares in public listed companies. So quite obviously, there were two distinct facilities – (i) a fixed loan of RM125,000 (hereinafter called the fixed loan) and an overdraft of RM45,000 (hereinafter called the 1st overdraft) secured by two land charges, and, (ii) an overdraft of RM650,000 (hereinafter called the 2nd overdraft) secured by the deposit of shares in listed companies. The plaintiff further asserted that the defendant defaulted on the agreed repayments, that the plaintiff demanded on 19 June 1998 (see encl. 4 exh. P4) from the defendant for his payment of the said arrears (RM2,944.80), that the defendant failed to comply with the plaintiff's said demand, that the plaintiff issued a notice in Form 16D dated 13 October 1998 (encl. 4 exh. P5) to the defendant, and that the defendant failed to remedy the default. According to the last accounts filed herein (encl. 32), as at 29 September 2000, the defendant is indebted to the plaintiff in the sum of RM621,318.24, made out as follows:

(a) fixed loan	–	RM130,177.86
(b) 1st overdraft	–	RM 62,515.21
(c) 2nd overdraft	–	RM428.625.17

Total		RM621,318.24

Both learned counsel, Miss Ana Shahrana for the plaintiff and Mr Cherian Kuruvila for the defendant, informed the court, that this application for an order for sale is only with regard to the sums outstanding on the fixed loan and 1st overdraft (RM130,177.86 + RM62,515.21), in other words only with regard to the loans secured by the two legal charges. Both learned counsel also informed, that the only issue for judicial determination is whether the Form 16D was bad. Apparently, in the said notice in Form 16D, the plaintiff required the defendant to remedy not only the breach with respect to the charge but also with respect to the breach of the 2nd overdraft secured by the deposit of shares.

Mr Cherian contended that the said Form 16D was bad and therefore of no effect. "In the said Form 16D, the 2nd overdraft secured by shares was demanded." "The only sum that could be demanded in the said Form 16D notice must be that due under the charge." "The 2nd overdraft was not due under the charge." "The unpermitted demand rendered the said Form

16D null and void." Mr Cherian further contended that the impression conveyed to the defendant by the said Form 16D was, that to redeem the said land the defendant had to settle all sums due, both secured and unsecured by the charges. "That Form 16D was the foundation", and "since it was bad, sale should not be ordered."

Miss Ana Shahrana had earlier contended that cl. 10 of the annexure to the 2nd charge permitted the plaintiff to grant further advances to the defendant.

and that such further advances shall be secured by the 2nd charge. However, in view of the present understanding that this application for an order for sale is only with regard to the sums outstanding on the fixed loan and 1st overdraft (RM130,177.86 + RM62,515.21) and so that therefore the plaintiff is not relying on the 2nd charge to recover the 2nd overdraft, it must be so supposed that Cik Ana Shahrana had effectively abandoned her earlier argument altogether. Otherwise, she just said that the court in *Oriental Bank Bhd v. Mohinder Pal Kaur a/p Tirlok Singh* [1996] 1 MLJ 788 (where the court, pursuant to the chargor's application to set aside the order for sale, deducted that sum, unsecured by the charge but nonetheless demanded by the Form 16D, from the sum ordered to be recovered by sale of the land), did not set aside the order for sale.

It is only apt, since the one and only issue for judicial determination concerns the said notice in Form 16D, to refer to the pertinent statutory provisions. On the remedies of chargees with regard to the judicial sale of the land charged, Chapter 3 to Part 16 of the National Land Code 1965 (Code) begins with s. 253 which reads:

(1) The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which the charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

(2) The powers conferred by this Chapter shall be additional to those conferred by Chapter 4, and no chargee shall be debarred from exercising them by reason of the fact that he has already taken action under that Chapter.

The following provision, s. 254, reads as follows:

(1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-s. (1) of s. 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D –

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) ... .

(3) If at the expiry of the period specified in any such notice the breech in question has not been remedied –

(a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter;

Provided that para (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

It would be seen that the notice in Form 16D concerns only the case of a charge where there is a breach by the chargor of any of the agreements on his part expressed or implied therein. That notice in Form 16D must specify the particular breach of the charge. Section 254 requires that Form 16D to be served before action for sale is taken. Only if the breach in question has not been remedied at the expiry of the period specified in the said Form 16D, may the chargee apply for sale in accordance with the provisions of Part 16 Chapter 3 of the Code. Clearly, the provisions of Chapter 3 to Part 16 "are exercisable, as appropriate, only by chargees under registered charges ... the remedy of judicial sale belongs exclusively to the registered chargee ... the property cannot be sold under the Code where action is taken by the 'equitable' chargee ..." (*National Land Code, A Commentary* by Judith Sihombing 2nd edn p. 552). "... the Code recognizes only registered chargees. Hence, before the plaintiffs could invoke their right under s. 256 of the Code they must first be registered chargees ..." (*Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn. Bhd.* [1990] 2 CLJ 711 per Mohamed Dzaiddin J, as he then was). There could be no mistaking it. Only a registered chargee may serve a notice in Form 16D. And that notice in Form 16D must bear only upon the registered charge. That notice in Form 16D, available only to a chargor qua chargor to give notice to the chargor to remedy the specified breach of the charge in question, before action for sale is taken, cannot be taken

out for any other purpose (see *Jacob v. Overseas-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161). Only if the breach of the charge has not been remedied at the expiry of the period specified, is the chargee sanctioned to apply for an order for sale.

Yet, in spite of the aforesaid, the instant plaintiff required the defendant, to remedy both the breach with respect to the charge and with respect to the 2nd overdraft secured by the deposit of shares. As for the reason, Miss Ana Shahrana said that the shares deposited had been sold but the sale proceeds received was not enough to settle the 2nd overdraft. Mr Cherian contended that the impression conveyed to the defendant by the said Form 16D was, that to redeem the said land the defendant must settle both the secured and unsecured loans. Indeed, in the instant case, the plaintiff warned the defendant that proceedings would be taken to obtain an order for sale, unless both the sum of RM106,455.43 due on the fixed loan secured by a charge and the sum of RM399,420.67 due on the 2nd overdraft secured by the deposit of shares were paid within seven days from the receipt of the said notice.

What is the legal effect of the inclusion of the loan unsecured by a charge in the said notice in Form 16D?

In *Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd* [1984] 1 CLJ 78, where the plaintiff had lumped together all the amounts due under two separate charges, and the defendant contended that the plaintiff ought to have issued separate notices, the Federal Court per Mohamed Azmi FJ said:

> In our view, where a notice of default with respect to a charge or charges in Form 16D is bad in law would depend on whether the chargor has been prejudiced or misled by any defect in the notice so as to render the granting of the order for sale unjust, and this in turn must necessarily depend on the circumstances of each particular case.

Guided by that ratio in *Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd*, Zakaria Yatim J (as he then was) held in *United Malayan Banking Corpn. Bhd. v. Bahruddin bin Mohammad @ Mamad* [1992] 4 CLJ 2060 (where the plaintiff admitted that the amount due as at 31 May 1988 was RM268,729.17 but that the amount stated in the notice in Form 16D was RM283,385.09), that there was no evidence that the defendant had been prejudiced or misled by the amount stated in the notice, and that therefore the notice in Form 16D was not bad in law.

Likewise guided by *Syarikat Kewangan Melayu Raya Bhd,* Suriyadi b Halim Omar J held, in *Southern Bank Berhad v. Chuah Beng Hock* [1999] 5 CLJ Supp 620 (where the lender bank demanded both the secured and unsecured loan), that the debtor foist with the additional burden of the loan unsecured by a charge could not have been not prejudiced by the defect in the said notice, and for that reason finding cause to the contrary, the learned judge dismissed the application for an order for sale.

It would be otherwise if just an erroneous sum was demanded. In *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144, where cl. 5 of the charge annexure required a notice to be served before any default interest could be imposed and there was no evidence to show that such notice had been given, Lim Beng Choon J held that the wrongful demand for default interest rendered the notice in Form 16D ineffectual and invalid. But the learned judge clearly acknowledged that there is a distinction between an innocent erroneous sum specified in a demand and a wrongful demand for payment of something to which the chargee is not entitled whether under the charge or under a statutory provision. At p. 1151, the learned judge said:

> It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff had no right.

Miss Ana Shahrana sought to overcome the odds by submitting the persuasive authority of *Oriental Bank Bhd v. Mohinder Pal Kaur a/p Tirlok Singh (supra).* Just that the circumstances of that case are quite different altogether. In *Oriental Bank Bhd v. Mohinder Pal Kaur a/p Tirlok Singh (supra),* the applicant sought to set aside the order for sale made two years earlier, in 1993, in her absence. However, she failed to satisfactorily explain the inordinate delay in her setting aside application, and on the facts of the case, the court concluded that the setting aside application was not *bona fide*. This is not a setting aside application. This is not even a case in which the court could exercise its discretion to excuse a minor omission (see *Overseas Union Bank v. L & L Properties Sdn. Bhd.* [1999] 3 CLJ 47) or allow the correction of a deficiency (see *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608, where Mahadev Shankar J noted that the plaintiff had not provided the statutory particulars even in the 4th affidavit). This is a case where the plaintiff had no right to use the notice in Form 16D to demand for the additional sum of RM399,420.67. Foist with the additional burden of the 2nd overdraft that was much heavier than the burden of the fixed loan secured by the 1st charge, it could be hard to believe that the defendant would not have been prejudiced by the defect in the said notice.

Definitely, the defendant has demonstrated that the plaintiff has not complied with statutory requirements nor met the conditions precedent for the making of an application for an order for sale. After all, the defendant was not given any opportunity to remedy the breach only with respect to the charge. Rather, the plaintiff denied the defendant his statutory right, by a brazen disregard for the law. In the circumstances of this case, an order for sale would be unjust. Surely there is cause to the contrary. And so, for the above reasons, this application is dismissed with costs.